SERVED: February 14, 1994

NTSB Order No. EA-4072

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTA TION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of January, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. JOHN F. ANDERSON, Respondent.	)	Docket SE-12343

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on May 4, 1992, following an evidentiary hearing. [1] The law judge affirmed an amended order of the Administrator suspending respondent's commercial pilot certificate for 30 days. The Administrator alleged that respondent violated 14 C.F.R. 61.15(e) by his

[1]The initial decision, an excerpt from the hearing transcript, is attached.

failure to report a suspension of his motor vehicle license. [2] We deny the appeal.

Respondent was arrested on December 14, 1990 for driving under the influence of alcohol. The Administrator's complaint alleged that, on (or about) December 14, 1990, the State of Florida suspended respondent's driver's license when he refused to take a breath, blood, or urine test. [3] He did not report that motor vehicle action, as required by § 61.15(e).

Respondent, in his answer, admitted all these allegations. As an affirmative defense, he argued that he did not believe it necessary to report the suspension because the FAA had given "insufficient and inadequate notice of any requirement to report such action." Answer at unnumbered 2. [4]

At the hearing, however, respondent primarily testified, not of his understanding or notice of the regulatory requirement, but

---

[2]This rule requires that each person holding a certificate must file a written report of any "motor vehicle action" to the FAA no later than 60 days after the action. A "motor vehicle action" is defined in § 61.15(c)(2) to include:

> The cancellation, suspension, or revocation of a license to operate a motor vehicle by a state after November 29, 1990, for a cause related to the operation of a motor vehicle while intoxicated by alcohol or a drug, while impaired by alcohol or a drug, or while under the influence of alcohol or a drug . . . .

[3]Respondent's driver's license was issued by Virginia.

[4]In responding to the Administrator's discovery (attached to the Administrator's Motion for Partial Summary Judgment, and therefore a part of the record), respondent stated "It was my understanding that the reporting requirement began sixty (60) days after a drug or alcohol-related conviction."

to his uncertainty that there had been any action against his license prior to any conviction regarding the December 14, 1990 incident.[5] He testified that Florida counsel had filed a "Petition for Implied Consent Hearing" that respondent believed would stay any action and provide him a hearing on, among other things, whether he had refused to consent to the testing. He further testified that he subsequently received a letter stating that a hearing officer had found that respondent had refused to submit to the testing and also found that he had been told by the arresting officer that such refusal resulted in a 1-year suspension of his privilege to operate a motor vehicle (see Exhibit R-2, January 15, 1991 State of Florida Order). Respondent, nevertheless, testified to his belief that his license had not been affected in any reportable way until his July 8, 1991 guilty plea to alcohol-related reckless driving.

[5]In his reply to respondent's appeal, the Administrator argues that respondent may not be heard on this issue because it is different from the defense he offered in his answer (i.e., that the FAA had given insufficient notice of a requirement to report the suspension). Contrary to the Administrator's claim, neither our rules nor our precedent requires that respondent's position at the hearing be so limited. Our rule, at 49 C.F.R. 821.31(c) provides that law judges may deem waived any affirmative defense that is not raised in respondent's answer to the complaint. In both Administrator v. Sutton , NTSB Order EA-3434 (1991) and Administrator v. Galloway, et al. , NTSB Order EA-2939 (1989), cited by the Administrator, we merely affirmed a law judge's exercise of discretion in limiting the testimony and argument at the hearing.

Here, the Administrator has shown no abuse of discretion by the law judge. Although the Administrator first learned of the added defense during opening argument, and argued throughout the hearing that related testimony was irrelevant, he did not seek a continuance, nor did he argue, at any point in the hearing, that he was not prepared to deal with respondent's added claims.

Tr. at 21. [6]

Respondent explained that the January 15th letter was addressed to a John E. Anderson, Jr., whereas he is John F. Anderson, and referred to a driver's license number considerably different from his own. Because of this, and his belief that he was to have a hearing in advance of the decisions contained in that letter, he thought the letter was a mistake. He testified that he contacted his Florida counsel on a number of occasions for advice, but received no information. Calls to the Virginia motor vehicles department indicated that his driving record was clean.

The law judge found that respondent understood the reporting requirement and understood the import of the January letter, thus implicitly rejecting both of respondent's defenses. Tr. at 352. [7]

On appeal, respondent argues that the initial decision should be reversed and the Administrator's order dismissed because respondent held the honest and reasonable belief that his license was not suspended. Respondent argues that he took reasonable actions to determine the status of his license, and

---

[6]The Administrator's Notice of Proposed Certificate Action was issued shortly after this conviction. Respondent testified that he did not report the conviction because the FAA already knew of it. Tr. at 22.

[7]The law judge's discussion suggests that respondent was only on notice to report and obliged to report after he received the January letter. The Administrator's order suggests that he was obliged to report within 60 days of December 14, 1990. Whether respondent was obliged to report within 60 days of the December 14, 1990 incident or within 60 days of the January 15, 1991 letter is immaterial, as he did neither.

that reliance on legal counsel or on advice from an appropriate authority should excuse any reporting failure.

We cannot find, on this recor d, that respondent reasonably relied on information that proved to be incorrect. Florida counsel, according to respondent's own testimony, gave him no information regarding the status of his license pending the hearing on the substantive2 charge. And, that Virginia advised him his record was clean would not, we think, be reasonably relied on as proof of the status of his privilege to drive in Florida.[8]

Moreover, respondent offers no basis to reverse the law judge's rejection of respondent's explanation. The record included respondent's admission that Florida had suspended his license on or about December 14, 1990. The January letter from the State of Florida, which was sent to respondent's correct address, clearly stated that his license had been suspended as of December 14, 1990. That letter also stated:

> The findings of this order relate only to a determination of the suspension of your driving privilege . . . . The decision of the department shall not be considered in any trial for a violation of the offense of DUI . . . .

thus indicating that the suspension for failure to agree to testing was a matter ("action") separate from the substantive charge.

---

[8]There is no indication on the record that respondent contacted the Florida department of motor vehicles, a certain source of information regarding the status of his driving privilege in Florida.

The law judge's decision was also substantially based on his analysis of respondent's credibility, reached after observing respondent at the hearing. See Administrator v. Smith , 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge). [9] Respondent cites no example of reversible error in this regard.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The 30-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order. [10]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order. Chairman VOGT submitted the following concurring statement.

[9]Respondent has not, on appeal, pursued his argument at the hearing that the regulation is not reasonably read to require reporting of other than convictions. The plain language of the rule demonstrates otherwise.

[10]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

Concurring Opinion of Chairman Vogt
Administrator v. Anderson Notation Number 6234

Respondent makes a convincing case that he was not aware that his license had been suspended and that this was a reasonable belief. If the facts cited by respondent were the full extent of the record, I might be persuaded to credit respondent's define. However, in respondent's Answer to Complaint he pleaded: "FIRST DEFENSE, Respondent did not believe it necessary to report the December 14, 1990 license suspension to the Civil Aviation Security Division since the FAA had given insufficient and inadequate notice of any requirement to report such action." After admitting through his pleading that he knew of the suspension, I cannot now credit respondent's argument that he had no knowledge of the suspension. For this reason I concur in the majority's denial of respondent's appeal.

C.W.V.